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JAMES H. McKENNEY,

Brf. of Brown, Powers & Henderson

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

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MARK K. LOWRY, DELUCIOUS L. DeWITT AND JAMES G. SMITH, PLAINTIFFS IN ERROR,

VS.

THE SILVER CITY GOLD AND SILVER MINING COMPANY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

ARTHUR BROWN,
O. W. POWERS,
H. P. HENDERSON,
Attorneys for Plaintiffs in Error.

Star Printing Company, 143 S. West Temple.

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Brief for Plaintiffs in Error on Motion to Dismiss.

The federal question involved in this case is the right of a citizen of the United States to locate and patent a mining claim under the Act of Congress upon the public domain. The proceedings began in the Land Office. The plaintiffs in error there applied for a patent to a mining claim known as the Little Clarissa, the usual proceedings were had, notice by publication given. Pending the period of publication the defendant in error filed an adverse claim alleging that the land upon which the Little Clarissa was located was not public domain, but was occupied by a previous mining claim called the Wheeler. Within the thirty days required by law after filing the adverse claim the owners of the Wheeler brought this suit to test the right of the Little Clarissa to a patent.

Each party claims a right from the United States—a right to locate a mining claim. This raises the federal question on each side. Each one asserts a right. The denial of either may be reviewed in this court when the de-

termination does not depend upon a question of fact as in the case of Bushnell vs. Crooke Mining & Smelting Co, 148 U. S. 682, but upon the construction of U. S. Statutes as in this case. The motion to dismiss on the part of the defendant in error seems to concede that if the right of the Wheeler had been denied that a federal question would have been raised. It is equally true that the right of the Little Clarissa has been denied. Each party is an actor. In one sense each party is plaintiff. Each proceeds to assert a right of the same nature arising under the same law. The position of the litigants is illustrated by the case of Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 321.

> "The only sensible construction of the law is, that each party must prove his claim to the premises in dispute, and that the better claim must prevail."

That this sort of a controversy raises a federal question can hardly be denied in view of the fact that the right or privilege, or authority to locate a mining claim is expressly given by an Act of Congress and exists only by virtue of an Act of Congress and that each party in the pleadings in this case and in their adverse claim case "sets up and claims" his right by describing his location and the law under which it is made. These plaintiffs in error, defendants below, at great length set up the nature of their location and their claim and their right to make it. This raises a federal question, either by the Writ of Error to the State Court or the statute of removal to United States Court or original suit in United States Court. This is fully discussed in the case of Shoshone Min. Co. vs. Rutter, 87 Fed. 802 where Judge Hawley says:

> "The Circuit Courts of the United States have jurisdiction to try all cases instituted under and by virtue of the provisions of section 2326 of the

Revised Statutes, independent of the question of citizenship of the respective parties. Frank G. & S. M. Co. vs. Larimer M. & S. Co., 8 Fed. 724; Cheesman vs. Shreve, 37 Fed. 36; Doe vs. Mining Co., 43 Fed. 219; Strasburger vs. Beecher, 44 Fed. 209, 213; Burke vs. Mining Co., 46 Fed. 644, 646; Wise vs. Nixon, 76 Fed. 3, 6. But it is argued by appellant's counsel that all of these decisions have been virtually overruled by the decision of the Supreme Court in the case of Bushnell vs. Mining Co., 148 U. S. 682, 13 Sup. Ct. 771. As we understand the decision in that case, no such question as is here presented was there raised, discussed or decided. That action was brought in the State Court, tried in the State Court and an appeal was taken to the Supreme Court of the State; and after a petition for rehearing was filed the losing party for the first time suggested that a federal question was involved, to-wit, a construction of section 2322 of the Revised Statutes. The petition for rehearing being denied, a writ of error was sued out, and the case taken to the Supreme Court of the United States. The writ of error was there dismissed upon the ground—to quote the language of the decision:

'The attempt to raise for the first time a federal question in a petition for re-hearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing, after judgment, is not properly raised, so as to authorize this court to review the decision of the highest court of the state.'

"No question was raised as to the competency of the courts, either national or state, to try a case brought under the provisions of section 2326. The only question at issue there, under the pleadings and at the trial, was as to the true course of the lode or vein. The instructions referred to in the opinion had reference to that question only, which was solely a question of fact; and the court said that no federal question

was involved—that is, that no question was raised which called for any construction of section 2322.

"The other decisions that we have cited go directly to the point raised in this case. In Burke vs. Mining Co., 46 Fed. 644, 646 the court said:

'It is claimed on one side, and denied on the other, that this suit, having been brought to determine the title to a mining claim, in pursuance to the requirements of section 2326 of the Revised Statutes, as amended in March, 1881, (1 Supp. Rev. St. p. 609) is for that reason a suit arising under the laws of the United States, within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the questions involved in the litigation. It seems to us that all the authorities, as they now stand have determined the question in favor of the affirmative of this proposition.'

"In Jackson vs. Roby, 109 U. S. 440, 3 Sup. Ct. 301, which was a suit brought in the Circuit Court of the United States for the District of Colorado in support of an adverse claim under the provisions of section 2326 of the Revised Statutes, the court disposed of the case upon its merits, and it is certainly fair to assume that it had no doubts as to its jurisdiction in the premises."

See also: Spokane Falls & Northern Ry. Co. vs. Ziegler, 167 U.S. 72.
Dowlan vs. Carr 125 U.S. 618-620.

Not only did this court tacitly recognize the right to review by writ of error the opinions of the Supreme Court of the State in the case of Jackson vs. Roby, but also in the case of Rose vs. Richmond Min. Co. 114 U. S. 576 where the entire decision and correctness of the Supreme Court of Nevada in just such a case was carefully examined on the ground that the court had jurisdiction to do it.

The right of each adverse claimant in this case depended upon the construction of the law and did not depend upon any question of fact and the questions of law arise upon the construction of the United States Statute. The Supreme Court of Utah in this case has so construed the United States Statute as to enforce the right claimed

by the plaintiff in the suit, (defendant in error,) and to deny the right claimed by the defendants, (plaintiffs in error.) Counsel states in his motion to dismiss that plaintiffs in error cannot maintain this writ of error because the judgment of the Supreme Court of Utah *affirms* a right arising under the laws of the United States. That would be true if the judgment only *affirmed*, but the judgment also *denies* a right arising under the laws of the United States and the decision is against the validity of a right arising under the laws of the United States. The Supreme Court of Utah decided nothing but a construction of the law.

The court in its opinion says that the plaintiffs in error were not authorized to locate the Little Clarissa, and denies the right of plaintiffs in error to a patent solely on the ground of the construction of the Statute of the United States. Wherever the validity of such a right is involved and the decision is placed upon that ground as expressed in the opinion the right to bring this error arises.

Crowell vs. Randell, 10 Peters 368, (9 Lawyers Co-op Ed. 458.)

Brown vs. Atwell, 92 U. S. 327, (23 Lawyers Co-op Ed. 511.)

Citizens Bank vs. Board of Liquidation, 98 U. S. 140, (25 Lawyers Co-op Ed. 114.)

Chouteau vs. Gibson, 111 U. S. 200, (28 Lawyers Co-op Ed. 400.)

Detroit City R. Co. vs. Guthard, 114 U. S. 133, (29 Lawyers Co-op Ed. 118.)

Bolling vs. Lersner, 91 U. S. 594, (23 Lawyers Co-op Ed. 366.)

Note to Hamblin vs. Western Land Co., 147 U. S. 530, (37 Lawyers Co-op Ed. 267.)

The Supreme Court of Utah in denying the right set up and claimed by the plaintiffs in error places a construction upon the Statutes of the United States which expressly overrules the decision of the Supreme Court of the United States, in the case of Gwillim vs. Donnellan, 115 U. S. 46. The same question arises in this case as arose in that.

The plaintiff below, defendant in error, was the owner of a claim called the Wheeler situate in an organized mining district known as Tintic Mining District, Utah. That district had provided certain by-laws under the delegated authority of the United States Statute, Section 2322. Among those by-laws was the following:

SECTION 8.

> "All locations whether mining claims or tunnels shall be distinctly marked on the ground by a substantial stake or monument, not less than three feet high on which shall be written or posted a legible notice giving the date of location, the number of feet in length of the claim or tunnel, the number of feet each way from notice both in length and width, its direction and the name or names of the person or persons making the location and such notice shall so describe such location that its boundaries can be readily traced on the surface, and all records of location hereafter made shall contain such description of the location by reference to some natural object or permanent monument as will identify the same and the locator shall be required to keep the notice of location written or posted on the location stake or monument legible and in good condition thereafter."

The by-law is not only proven, (page 116 agreed record) but is among the findings. (See finding page 213 agreed record.) The effect of that by-law was the same as if it was part of the Statute of the United States. The location of the Wheeler must be made in conformity

with it. The discovery must be not only made by the visual seeing of ore, but the "spot" must be designated as provided in that by-law; the place of discovery becomes a part of the validity of the location. In fact the words "discovery" and "location" become synonomous. The location in the sense of that by-law is not the total area of the mining claim, it is the point of discovery as is shown by reference to the distance each side of it. The location and discovery are alike the place where the stake is placed upon mineral in place. And the concluding paragraph of Section 8 of the by-laws above quoted provides that "the locator shall be required to keep the notice of location written or posted on the location stake or monument legible and in good condition thereafter." The boundaries of the claim must be made in conformity with the place of location. It must be so many feet on each side of that particular point and the notice which the law also requires to be prepared must state the distance length wise each side of that discovery point. So that the discovery provided for by the local rules and laws of the United States is something very different from merely finding ore. It is the establishing of the place as well. The Supreme Court of the State of Utah has confounded the different uses of the word "discovery." As they use it it simply means the finding of ore in place, finding a vein of ore running across the mining claim, but the local laws of that district meant something very different by "discovery." They mean by "discovery" the establishing of a point where the ore crops to the surface and where the notice of discovery is posted. The laws of Tintic Mining District make the discovery point tantamount to the discovery shaft required by the laws of the State of Colorado. Compare the local law above quoted with the law of Colorado under which the case of Gwillim against Donnellan, *supra*, was

decided as quoted in the case of Erhardt vs. Boaro, 113 U. S. 527:

> "The location must be distinctly marked on the ground, so that its boundaries can be readily traced, and, within one month thereafter, that is within three months from the discovery, a certificate of the location must be filed for record in the county in which the lode is situated, containing the designation of the lode, the names of the locators, the date of the location, the number of feet claimed on each side of the center of the discovery shaft, the general course of the lode, and such a description of the claim, by reference to some natural object or permanent monument, as will identify it with reasonable certainty. Rev. Stat. Par. 2324; Gen. Laws of Colorado, Pars. 1813-1814."

The Wheeler had been located a number of years when the owners executed a lease of it to a part of the plaintiffs in error. While those lessees were working it under the lease an adjoining owner, the Rabbits Foot Mining Co., applied for a patent upon a claim known as the Evening Star and in a survey for a patent, so surveyed the Evening Star as to include that part of the Wheeler which contained the notice of discovery, the point of discovery, "the spot of discovery" as the defendant in error calls it. The Rabbits Foot Company made the usual publication in their application for patent (See Record p. 212). Pending that publication the lessees demanded of the owners of the Wheeler that they should protect the title by making an adverse claim. The owners of the Wheeler, the lessors, presistently neglected and refused to make any adverse claim. The period of publication for the mining claim known as the Evening Star lapsed and the right of the Rabbits Foot Company to that land became absolute thereafter; neither the owners of the Wheeler nor the Little Clarissa could gainsay the right of the Rabbits Foot to that particular

land. The point of discovery being thus taken away the land reverted to the public domain and was open for location. The right and privilege of any citizen to locate upon that part of the Wheeler not included in the Evening Star became a right given by the laws of the United States, and that right depended upon the construction of the United States Statute and is reviewable here.

The failure to file an adverse claim against the Evening Star was a conclusive admission on the part of the owners of the Wheeler that the Wheeler location was invalid and void. The patenting of the point of location and discovery by the Evening Star rendered the Wheeler location, utterly void. As the discovered lode must lie within the limits of the location which is made by reason of it, if the title to the discovery fails, so must the location which rests upon it.

Gwillim vs. Donnellan, 113 U. S. 45, 50.

In that case the Court says:

> "Having failed to assert his claim he lost his title as against the United States, the common source of title to all. The issue of the patent to Fallon was equivalent to a determination by the United States, in an adversary proceeding to which Thomas was in law a party, that Fallon had title to the discovery superior to that of Thomas. and that consequently Thomas' location was invalid. This barred the right of Thomas to apply to the United States for a patent, and of course defeated his location. From that time all lands embraced in his location not patented to Fallon were open to exploration and subject to claim for new discoveries. The loss of the discovery was a loss of the location."

See also Moyle vs. Bullene, 44 Pac. 71.

> "A prior discovery is necessary to a valid location. No discovery made after a location would make that location valid."

Upton vs. Larkin, 5 Mont. 600; 6 Pac. Rep. 66; 7 Mont. 449; 17 Pac. Rep. 728.

Armstrong et al. vs. Lower et al., 6 Col. 393. (15 Mor. Min. Rep. 631.)

Armstrong et al. vs. Lower et al., 6 Col. 581. (15 Mor. Min. Rep. 458.)

The case of Golden Terra Mining Co. vs. Mahler, 4 Mor. M. Rep. 390, 399, arrives at the same conclusion.

The discovery must be made within the limits of the location as it is ultimately marked upon the ground. A location based upon a discovery made within the limits of another existing and valid location is void.

Lindley on Mines, Vol. 1 Par. 337 page 441 and cases there cited.

Cheesman vs. Shreeve, 40 Fed. Rep. 787.

Michael vs. Mills, 22 Col. 439, 45 Pac. Rep. 429.

Where a person who has located a mining claim permits an adjoining occupant to patent that part of his claim on which is located his discovery shaft the remaining portion thereof reverts to the condition of public lands, and is relocatable; and such rule applies, though the patentee made his location after such person.

Miller et al. vs. Girard et al., 3 Colo. Court Appeals 278.

33 Pac. Rep. 69.

We desire to call particular attention to the case of Girard et al. vs. Carson et al., 44 Pac. Rep. 508; 22 Colo. 345, which is one on all fours with the one at bar. In that case the court said:

"In order that the locator of a mining claim may obtain any right to mining property by virtue of

> his location, the same must be made upon the unappropriated lands of the United States; and where application is made for a patent to another which includes within its exterior limits the original discovery shaft of a prior location, it is necessary for the owners of such prior location to institute adverse proceedings within the time provided by law, if they desire to hold any portion of the property by reason of their original location. Where such adversary proceedings are commenced and determined adversely to the claimant he thereby loses all right not only to the territory actually in conflict, but all right based upon such location, and a party failing to institute adverse proceedings within the time prescribed by statute stands in the same, and no better position than one who has instituted such proceedings and suffered defeat. It matters not that the party in fact has the senior location. Upon failing to institute adverse proceedings it will be conclusively presumed that his rights are inferior and subject to the party obtaining a patent."

The court held that the following instruction correctly stated the law upon this subject:

> "The jury are instructed that if you believe from the evidence that the original discovery shaft of the Long John lode was sunk on unappropriated ground, and that afterwards the plaintiffs permitted it to be taken away from them, and patented as a part of the North Star Lode mining claim, the plaintiffs cannot recover in this suit unless they made another location on unappropriated ground by setting up a new discovery stake at the new discovery shaft, and otherwise complied with the requirements of the law as indicated in instruction one, with regard to the location of a mining claim."

The proceeding to obtain a patent is a proceeding *in rem* and has the force and effect of a judgment *in rem*. Judge Sawyer says:

> "The proceeding is in the nature of a proceeding *in rem* and is binding *upon all the world* so far as any unpresented adverse claim is concerned."
>
> Hamilton vs. Souther Nev. G. & S. Co., 33 Fed. 565.

When the Rabbit's Foot Company applied for a patent on the Evening Star and advertised it, that was the equivalent of the service of a summons upon each and every person in the world, requiring all who claimed title against the Evening Star to appear within sixty days. No one appeared and in the language of the statute, "*thereafter no objection from third parties to the issuance of the patent could be heard.*" It became "*a judgment*;" it had all the force aud effect of a judgment. It was before a tribunal having jurisdiction of the law and fact. The court had jurisdiction of all the persons, because it was a proceeding *in rem.* The failure of the Wheeler to appear and adverse was a confession of judgment. It made no difference even though the Wheeler had been located earlier than the Evening Star. Judgment had gone by default against the Wheeler; its rights were gone. The final rendition of the judgment was not the obtaining of the certificate of the entry of the land; that was a necessary performance against the United States, but as against individuals the act which decides the right of the claimant is the expiration of the period of publication. That period expired on the 6th day of August, 1897, in the case of the Rabbit's Foot Company. On that day as against all individuals the Rabbit's Foot Company was entitled to a patent on the Evening Star. Its right was completed, ended, closed, judgment rendered as of the day. The Rabbit's Foot Company had all the time they wanted in which to pay for the land. Outside parties could not interfere or object, nor would delay revive rights which had been lost by failure to adverse or recreate claims which had become nullities.

When the Rabbit's Foot Company surveyed and took away the point of discovery of the Wheeler claim what was taken?

Was it only the little land there included, or did it render the whole location of the Wheeler null and void? The decisions are very clear on this subject. To quote again from Gwillim vs. Donnellan, 115 U. S. 50:

"*If the title to the discovery fails so must the location which rests upon it.*" And in that case the contention was with regard to lands on the original location. It was not the *act of the third party* which deprived the Wheeler of its rights as counsel erroneously states. It was the *act of the Wheeler* in not filing an adverse claim against the Evening Star. When the Wheeler failed to file the adverse claim they thereby lost all right not only to the territory actually in conflict *but all right based upon such location.*

Counsel in the motion to dismiss urges that this case turned upon other questions that were local in their nature or involved questions of law not federal in their nature referring to the relation of landlord and tenant, which existed between some of the plaintiffs in error and the defendant in error. It is sufficient answer in this motion to dismiss, that the decision of the Supreme Court of Utah did not turn or depend upon the relation of landlord and tenant. They held the Wheeler claim valid, not because plaintiffs in error were tenants of the Wheeler claim, but because of their interpretations of the United States Statutes. They held it valid not only as against the tenants, but as against all the world. This must necessarily have been the decision of the law, because it is impossible that the Wheeler claim can be a valid mining claim against these parties only and an invalid claim against all other persons. Not only did the Utah Supreme Court rest its decision upon the construction of the United States Statute in holding the Wheeler claim valid, but the court below at the

time a motion of non-suit was made and upon which his decision finally rested placed the decision upon the ground of the validity of the Wheeler claim as against all the world. (See language of Trial Judge, Record p. 120 folio 231.)

> "My conclusion is that the segregation of the first discovery under the circumstances, as shown by the circumstances in this case, did not divest the title to the remaining portion of the Wheeler claim in the plaintiff; it did not vacate the Wheeler location and did not subject it to entry by other parties, but that so far as the evidence shows at this time, the Wheeler claim was from the date of its location up to the present time a valid and subsisting location."

But this question of landlord and tenant as it arises is a question of a right exercised under the laws of the United States and is a question reviewable here. The Statute of the United States, section 2319, provides that the mineral lands of the United States shall be open to exploration and purchase by "citizens of the United States." That means citizens of all kinds, of all occupations, of all relations. It applies as well to tenants as to landlords, to lessees as to lessors. If in making the location such fiduciary relations exist between locator and another that the locator cannot set up his title against such other person the remedy would not be to destroy the location, but the locator would be a trustee for the real beneficiary. If these plaintiffs in error could not make a valid location against their landlords it would not make the Wheeler more valid, but the remedy of the landlord would be to have a trust declared in its favor for the Little Clarissa. The right to make the location exists the same although it might be in some instances that the claim when located would become the property of another, and had the Utah

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Supreme Court put their opinion on that ground, we would have had a right to review it. But that court has not placed its opinion upon that ground, nor upon the ground of abandonment. The subject of abandonment was an additional reason urged why the defendant in error could not recover and did in no manner affect the main question upon which the case was decided both in the court below and in the Supreme Court.

ARTHUR BROWN,
O. W. POWERS,
H. P. HENDERSON,
Attorneys for Plaintiffs in Error.